STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals (Meter, P.J., and Talbot and Borrello, JJ.)

In the Matter of the Approval of a
Code of Conduct for CONSUMERS ENERGY
and THE DETROIT EDISON COMPANY

_____/

THE DETROIT EDISON COMPANY,

Appellant,

v.

MICHIGAN PUBLIC SERVICE
COMMISSION, et al.,

Appellees.

_____/

Supreme Court No. 125950
Court of Appeals No. 237872
MPSC Case No. U-12134

CONSUMERS ENERGY COMPANY,

Appellant,

v.

MICHIGAN PUBLIC SERVICE
COMMISSION, et al.,

Appellees.

_____/

Supreme Court No. 125955
Court of Appeals No. 237874
MPSC Case No. U-12134

MICHIGAN ELECTRIC COOPERATIVE
ASSOCIATION, et al.,

Appellants,

v.

MICHIGAN PUBLIC SERVICE
COMMISSION, et al.,

Appellees.

_____/

Supreme Court No. 125954
Court of Appeals No. 237873
MPSC Case No. U-12134

AMICUS CURIAE BRIEF OF SBC MICHIGAN

Craig A. Anderson (P28968)
SBC MICHIGAN
444 Michigan Avenue, Room 1750
Detroit, Michigan 48226
(313) 223-8033

Jeffery V. Stuckey (P34648)
Allen L. Lanstra, Jr. (P64102)
Attorneys for SBC Michigan
DICKINSON WRIGHT PLLC
215 S. Washington Square, Suite 200
Lansing, Michigan 48933-1816
(517) 371-1730

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COUNTER-STATEMENT OF ISSUES PRESENTED

Whether the December 4, 2000 and October 29, 2001 orders ("Orders") of the Michigan Public Service Commission ("PSC") adopted rules, i.e., a code of conduct, that require promulgation under the rulemaking process prescribed by the Administrative Procedures Act ("APA").

The Court of Appeals answered "no."

Appellant The Detroit Edison Company answered "yes."

Appellant Consumers Energy Company answered "yes."

Appellant Michigan Electric Cooperative Association answered "yes."

Appellee PSC answered "no."

Appellee Michigan Alliance for Fair Competition answered "no."

Amicus curiae SBC Michigan answers "yes."

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae, SBC Michigan ("SBC"), is a telecommunications provider in the state of Michigan. SBC is subject to certain regulation by Appellee, the Michigan Public Service Commission ("PSC"), the governmental agency authorized by statute to regulate telecommunications services in Michigan. Attendant to that function, the PSC has certain authority to promulgate administrative rules, MCL 484.2213, and to issue contested case orders, MCL 484.2203(1). As such, SBC has a compelling interest in ensuring PSC compliance with the rulemaking provisions of the Administrative Procedures Act of 1969 ("APA"), MCL 24.201 et seq. SBC therefore, by separate motion, seeks leave to file this amicus brief.[1]

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[1] SBC discloses pending litigation before the Michigan Court of Appeals in the matter of SBC Michigan v MPSC, Court of Appeals Docket No. 256177 (MPSC No. U-13774). In that matter, the PSC adopted rules of procedure for resolving disputes in arbitration and mediation cases, and it adopted these rules in a docket that was neither a rulemaking nor a contested case proceeding. SBC's position in that matter is that the PSC did not follow the rulemaking process required by the APA, and that the PSC's order should be vacated.

I. SUMMARY OF ARGUMENT

The Court of Appeals decision on the issue for which this Court granted leave to appeal is erroneous.[2] The decision failed to follow the binding precedent[3] of In re PSC Guidelines, 252 Mich App 254; 652 NW2d 1 (2002), which held that the Michigan Public Service Commission ("PSC") has two options for acting with binding effect, either via rulemaking or a contested case. A contested case is defined in the Administrative Procedures Act ("APA") as a proceeding "in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). A rule is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency." MCL 24.207. These concepts are mutually exclusive; a "rule" may not be adopted through a "contested case," but rather must be adopted pursuant to specific rulemaking procedures.

The code of conduct adopted by the PSC's Orders was "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies" Public Act 141 of 2000 ("PA 141"), a law enforced and administered by the PSC. It applied to all electric utilities and alternative electric suppliers. Hence, the PSC was required to adopt the code under the rulemaking mechanism of the APA.

The Court of Appeals sustained the Orders because the PSC purported to adopt the code of conduct after contested evidentiary hearings. The APA excludes a "determination, decision, or order in a contested case" from the definition of "rule" and thus from the APA's rulemaking

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2 *Amicus curiae*, SBC Michigan ("SBC"), takes no position on any of the other issues that were involved in the case.

3 MCR 7.215.

requirements. MCL 24.207(f). The PSC was not excused from the APA rulemaking procedures by adopting the code of conduct rules through a contested case-like proceeding. In re PSC Guidelines held that the PSC may not adopt administrative rules through adjudication. That, however, is what happened here.

The Court of Appeals also erred in finding that a second exception to the definition of "rule" applied. By its plain language, MCL 24.207(j) refers only to permissive statutory power. Thus, while statutory power that an agency may exercise in its discretion is covered by MCL 24.207(j), statutory power an agency must exercise is not. This Court has already announced this principle in Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs, 431 Mich 172; 428 NW2d 335 (1988). In the present case, PA 141 provides that the PSC "shall establish a code of conduct." This is a *mandatory* directive, not the grant of *permissive* statutory power. Accordingly, its exercise is not protected by MCL 24.207(j).

Regardless, MCL 24.207(j) protects only "[a] decision to exercise or not to exercise" a permissive statutory power. The exclusion does not harbor the exercise *of* that power, as the Court of Appeals itself recognized here but excused. This Court has already announced this principle in AFSCME v Dep't of Mental Health, 452 Mich 1; 550 NW2d 190 (1996). Thus, the adoption of the code of conduct is not exempt under MCL 24.207(j).

II. FRAMEWORK OF ARGUMENT

A. Relevant Background

The PSC possesses no common law powers but is, rather, a creature of limited authority, possessing only the powers expressly granted to it by the Legislature. Union Carbide Corp v

MPSC, 431 Mich 135, 146; 428 NW2d 322 (1988). The PSC is an "agency" as that term is defined by the APA and must, therefore, comply with its requirements. MCL 24.203(2).

In order for the PSC to adopt a "rule," the APA requires it to follow specific rulemaking procedures. These quasi-legislative procedures include, inter alia: publication of the proposed rule; the declaration and filing of the statutory or regulatory basis for the rule; identification of the problem the proposed rule intends to address; assessment of the significance of the problem; public hearing and notice thereof; the opportunity for persons to present data, views, questions, and arguments at the public hearing; submission and approval by the Legislative Service Bureau and Office of Regulatory Reform; notice and an opportunity for consideration and review by the Legislature itself; and filing with the Secretary of State for publication in the Michigan Administrative Code. See MCL 24.231 et seq.[4]

Where the PSC is not adopting a "rule" as defined by the APA, it may develop standards and interpret statutes on a case-by-case basis through a quasi-judicial "contested case." The procedures for a "contested case" are distinct from the quasi-legislative rulemaking procedures, and include, inter alia: named parties; notice and opportunity to be heard; a statement of the particular statutes and rules involved; a short and plain statement of the matters asserted; testimony of witnesses; oaths; depositions; discovery; application of the rules of evidence; impartial presiding officers; and decisions with delineated findings of fact and conclusions of law. See MCL 24.271 et seq.

Pursuant to the legislative directive of PA 141, the PSC adopted a code of conduct governing the State's electric industry. It is undisputed that the code of conduct fits the definition

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[4] Public Act 491 of 2004, effective January 12, 2005, amended the APA. Although most of the amendments concerned the rulemaking process, none affect disposition of the issue presented in this case, since the amendments concern the legislative review process.

of a "rule" under MCL 24.207. The PSC, however, did not adopt the code of conduct pursuant to the APA's rulemaking procedures. Instead, it issued the code of conduct after a mere evidentiary hearing.

The PSC argues that it did not need to follow the APA's rulemaking procedures because its action fell within two exceptions to the APA's definition of "rule": (1) MCL 24.207(f), which provides that a "determination, decision, or order in a contested case" is not a "rule" subject to the APA rulemaking procedures; and (2) MCL 24.207(j), which provides that a "decision by an agency to exercise or not to exercise a permissive statutory power" is exempt from the rulemaking procedures.

The Court of Appeals agreed with the PSC. It first held that "the code of conduct is not a rule because it was implemented via orders entered in a contested case." Detroit Edison Co v MPSC, 261 Mich App 1, 11; 680 NW2d 512 (2004).[5] Then, acknowledging "while an agency's decision to exercise discretionary statutory authority does not constitute rulemaking, its implementation of that authority is subject to the APA's rulemaking authority," it nonetheless concluded that "the Legislature clearly intended for the PSC to implement a code of conduct." 261 Mich App at 12 (citations omitted).

This Court granted leave to appeal, limited to the question of whether the code of conduct is unlawful because it was not promulgated pursuant to the APA's rulemaking provisions.

B. The APA Definitions Of "Rule" And "Contested Case"

At issue is the APA definition of "rule," MCL 24.207, which states:

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5 The Court of Appeals opinion is attached as Exhibit A.

"Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. **Rule does not include** any of the following:

(a) A resolution or order of the state administrative board.

(b) A formal opinion of the attorney general.

(c) A rule or order establishing or fixing rates or tariffs.

(d) A rule or order pertaining to game and fish and promulgated under parts 401, 411, and 487 of the natural resources and environmental protection act, 1994 PA 451 . . . .

(e) A rule relating to the use of streets or highways, the substance of which is indicated to the public by means of signs or signals.

(f) **A determination, decision, or order in a contested case.**

(g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.

(h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.

(i) A declaratory ruling or other disposition of a particular matter as applied to a specific set of facts involved.

(j) **A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.**

(k) Unless another statute requires a rule to be promulgated under this act, a rule or policy that only concerns the inmates of a state correctional facility and does not directly affect other members of the public, except that a rule that only concerns inmates which was promulgated before December 4, 1986, shall be

considered a rule and shall remain in effect until rescinded but shall not be amended. As used in this subdivision, "state correctional facility" means a facility or institution that houses an inmate population under the jurisdiction of the department of corrections.

(l) A rule establishing special local watercraft controls promulgated under former 1967 PA 303. . . .

(m) All of the following, after final approval by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, 1978 PA 368, MCL 333.22215 and MCL 333.22217:

(i) The designation, deletion, or revision of covered medical equipment and covered clinical services.

(ii) Certificate of need review standards.

(iii) Data reporting requirements and criteria for determining health facility viability.

(iv) Standards used by the department of community health in designating a regional certificate of need review agency.

(v) The modification of the 100 licensed bed limitation for short-term nursing care programs set forth in section 22210 of the public health code . . . .

(n) A policy developed by the family independence agency under section 6(3) of the social welfare act, 1939 PA 250, MCL 400.6, setting income and asset limits, types of income and assets to be considered for eligibility, and payment standards for administration of assistance programs under that act.

(o) A policy developed by the family independence agency under section 6(4) of the social welfare act, 1939 PA 280, MCL 400.6, to implement requirements that are mandated by federal statute or regulations as a condition of receipt of federal funds.

(p) The provisions of an agency's contract with a public or private entity including, but not limited to, the provisions of an agency's standard form contract.

(q) A policy developed by the department of community health under the authority granted in section 111a of the social welfare

> act, 1939 PA 280, MCL 400.111a, to implement policies and procedures necessary to operate its health care programs in accordance with an approved state plan or in compliance with state statute.

MCL 24.207 (emphases added).

The APA definition of "contested case" provides:

> "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to an other agency, the hearing and the appeal are deemed to be a continuous proceeding as though before a single agency.

MCL 24.203(3).

C. Fundamental Principles Of Statutory Interpretation[6]

As to the interpretation of MCL 24.207 and MCL 24.203(3), "[a]n anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature." Roberts v Mecosta County Gen Hosp, 466 Mich 57, 63; 642 NW2d 663 (2002). Performing this fundamental task commences with an examination of the statutory language involved. Danse Corp v Madison Heights, 466 Mich 175, at 181-182 644 NW2d 721

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[6] Issues of statutory interpretation are questions of law that this Court reviews de novo. Danse Corp v Madison Heights, 466 Mich 175, 178; 644 NW2d 721 (2002). This is true even where the initial interpretation is made by an administrative agency. See Mayor of Lansing v MPSC, 470 Mich 154, 157-158; 680 NW2d 840 (2004).

(2002). If the statute's language is clear and unambiguous, then the plain meaning of the statute is assumed to represent the Legislature's intent and must be enforced as written. Id. at 182.

A statutory definition must be applied as expressly defined, and courts may not import any other interpretation. See, e.g., Tryc v Michigan Veterans' Facility, 451 Mich 129, 135-136; 545 NW2d 642 (1996). Statutory exceptions are to be given limited, rather than expansive, construction. AFSCME v Dep't of Mental Health, 452 Mich 1, 10; 550 NW2d 190 (1996) ("in order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed"); 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.11 at 250-51 (6th ed 2000) ("[W]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than exceptions").

III. ARGUMENT

A. The Code Of Conduct Fits The Statutory Definition Of "Rule"

The APA definition of a "rule" provides, in pertinent part:

> "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.

MCL 24.207.

The code of conduct promulgated by the PSC's Orders is "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies" PA 141, which the PSC enforces and administers.[7] The Court of Appeals recognized this; it noted that PA 141 required the PSC "to produce a generally applicable code of conduct," and that the code adopted by the PSC was "applicable to all electric utilities and alternative electric suppliers." 261 Mich App at 5. The Court made the following ultimate (and what should have been conclusive) finding: "The code of conduct falls within the APA's definition of a rule because it establishes substantive standards of general applicability that have the force and effect of law." Id. at 10.

Despite finding that the code of conduct fit the definition of a "rule," the Court of Appeals held that two exceptions to the definition of "rule" authorized the PSC to adopt the code outside of the rulemaking requirements of the APA. Neither holding is sustainable.

B. The Contested Case Exception Does Not Apply

1. The Plain Language Of MCL 24.207(f)

The Court of Appeals held that the rules at issue here—the "code of conduct"—fall within the exception for rulemaking procedures for a "determination, decision, or order in a contested case." MCL 24.207(f). Among the exclusions to the definition of "rule" listed in

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[7] Whether the agency describes a policy action as a "rule" is not of controlling significance. The agency label is not dispositive. Rather, the inquiry must focus on "the actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." DON LEDUC, MICHIGAN ADMINISTRATIVE LAW § 4:05 (West 2001) (citing Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services, 431 Mich 172; 428 NW2d 335 (1988)).

MCL 24.207, several actually employ the term "rule." See MCL 24.207(c) ("A rule or order establishing or fixing rates or tariffs"); MCL 24.207(d) ("A rule or order pertaining to game and fish . . . ."); MCL 24.207(e) ("A rule relating to the use of streets or highways . . . ."); MCL 24.207(k) ("a rule or policy that only concerns the inmates of a state correctional facility . . . ."); MCL 24.207(l) ("A rule establishing special local watercraft controls . . . ."). The word "rule" is not, however, used in the contested case exclusion. MCL 24.207(f) excludes only a "determination, decision, or order in a contested case."

This legislative choice is not without interpretive significance. Rather, the Legislature's decision to omit the word "rule" when enacting MCL 24.207(f) must be interpreted as intentional. See Farrington v Total Petroleum, Inc, 442 Mich 201, 210; 501 NW2d 76 (1993); Estes v Idea Eng'g & Fabricating, Inc, 250 Mich App 270, 279; 649 NW2d 84 (2002). See also 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (6th ed) ("[W]here the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded").

By omitting the word "rule" from MCL 24.207(f), it is evident that the Legislature specifically intended not to permit agencies to override the APA's rulemaking procedures by adopting a "rule" through a contested case. If the Legislature had so intended, it would have excluded "a determination, decision, order, or rule in a contested case" from the APA's rulemaking provisions.

2. The Statutory Definition Of "Contested Case" And The Legislature's Use Of "A Determination, Decision, Or Order In A Contested Case" Do Not Contemplate Quasi-Legislative Rulemaking

If the language of a statute is clear and unambiguous, then the plain meaning of the statute must be enforced as written. Danse Corp, 466 Mich at 182. A "contested case" is defined as "a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing . . . ." MCL 24.203(3). The principal provisions of this definition—a proceeding, determination of the legal rights, duties, or privileges, named parties, and an opportunity for an evidentiary hearing—clearly denote a quasi-judicial procedure. Thus, that the Legislature defined "contested case" as a quasi-judicial, not quasi-legislative, term cannot be seriously questioned.

It is with this definition of "contested case"—that of a quasi-judicial, not quasi-legislative, nature—that MCL 24.207(f) 's exclusion must be interpreted. As such, there can be little doubt that the Legislature's reference to "a determination, decision, or order in a contested case" does not contemplate rulemaking through adjudication. Determinations, decisions, and orders are not legislative products. Rather, each is the product of an adjudicatory proceeding. That is, when an agency exercises its quasi-legislative power by creating an administrative rule, it does not issue a "determination, decision or order" involving "a named party." Accordingly, it is evident that the Legislature did not contemplate that administrative rules would be

promulgated through "a determination, decision, or order in a contested case."[8] The plain language simply does not support such an interpretation.

3. Case Law Demonstrates That Administrative Rules Are Not To Be Adopted Through Adjudication

a) Michigan Case Law

The only Michigan case that has addressed the issue, In re PSC Guidelines, held that the PSC may *not* adopt administrative rules through a contested case. The In re PSC Guidelines court wrote rather straightforwardly:

> Invoking the public interest and the need for policy that is responsive to a changing industry, the PSC eschewed the procedural mandates of the APA in favor of its own course of action. By choosing to implement "guidelines" by order in a contested case against unnamed parties, yet with the force and effect of law, the PSC culled elements of rulemaking, adjudication, and general policy formulation, with little regard for the dictates of the APA. While we do not doubt the PSC's legitimate concerns [on the substantive issues], the process utilized by the PSC constituted a rather heavy-handed rebuke of established APA procedures, and, accordingly, we are compelled to invalidate that process.

252 Mich App at 267-268.

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[8] Further, it is noteworthy that PA 141 states that "the commission shall establish a *code* of conduct that shall apply to all electric utilities." MCL 460.10a(4) (emphasis added). A "code" is a "systematic collection, compendium or revision of laws, rules, or regulations." BLACK'S LAW DICTIONARY (6th ed). Codes are undeniably legislative creatures of general applicability. Thus, they are not created by courts or in adjudicatory proceedings.

Attempts to distinguish In re PSC Guidelines must fail. That the adjudicatory proceedings in the present case were originally commenced following the adoption of voluntary codes of conduct by the two named utilities means nothing. That PA 141 required the PSC to establish the code of conduct is also beside the point, for the APA includes no exemption for a legislative mandate to act. That the Legislature gave the PSC only a limited time to adopt the code of conduct fails to suggest rulemaking was inconceivable, for the APA includes no exception for rules that must be adopted in a limited amount of time. And that the Legislature specifically prescribed the types of measures that should be incorporated into the code of conduct fails to undermine the binding precedent of In re PSC Guidelines.

Finally, the argument that had the Legislature wanted the PSC to promulgate rules it would have done so expressly in PA 141 is a red herring. The Legislature enacted the APA over 35 years ago, imposing a specific rulemaking process on administrative agencies. This Court has held that absent a clear legislative intent to waive the requirements of the APA, one will not be inferred. See Danse Corp, 466 Mich at 184. Nothing in PA 141 provides the clear legislative intent necessary to waive the APA's rulemaking requirements. Rather, the Legislature is presumed to know the effect of existing statutes, and it would be nonsensical to expect each action mandated in specific statutes to be accompanied by instruction as to whether rulemaking must be followed or not.

The Michigan cases that are cited for the notion that the PSC may adopt rules through adjudication do not so hold. In Northern Michigan Exploration Co v MPSC, 153 Mich App 635; 396 NW2d 487 (1986), the court reviewed a PSC order in a contested case. The PSC did not enact an administrative rule of general applicability that would be applied prospectively only, rather it adjudicated a dispute over the ownership of drilling rights. In the contested case, the

PSC adopted and applied a formula to govern the production of the natural gas field at issue. In responding to a claim that the formula was a policy that should have been adopted pursuant to the APA's rulemaking procedures, the court wrote that "an agency has the option of setting standards either pursuant to the rule-making provision of the APA or case-by-case through adjudication." 153 Mich App at 649. However, Northern Michigan is not instructive to the present case. Unlike here, where the PSC announced a policy of general applicability for the future only (a quasi-legislative act), the PSC in Northern Michigan was forced to develop standards in order to resolve the individual dispute before the agency. In Northern Michigan, the PSC did not attempt to legislative for an entire industry. Rather, the PSC adjudicated the dispute over drilling ownership rights before it by determining what the law *was* and applied such interpretation retroactively to the individual case before it.

Similarly, in American Way Life Ins Co v Comm'r of Ins, 131 Mich App 1; 345 NW2d 634 (1984), the agency did not adopt rules of general applicability to be applied solely in the future. To the contrary, at issue in American Way was the classic judicial question, best determined on a case-by-case basis—whether an insurer's rate filing was *reasonable*, as required by statute. In resolving the petitioner's claim that the Commissioner's interpretation of what is "reasonable" required rule promulgation, the court correctly responded that "[t]he commissioner's decision . . . is not a ruling of general applicability. . . . The rate decision in a contested case is binding only upon the particular insurer or insurers involved." 131 Mich App at 7. The same is not true for the code of conduct in this case.

Likewise, in both Michigan Life Ins Co v Comm'r of Ins, 120 Mich App 552; 328 NW2d 82 (1982), and Detroit Auto Inter-Ins Exchange v Comm'r of Ins, 119 Mich App 113; 326 NW2d 444 (1982), the agency interpreted the meaning of a particular statute. That is, the agency

determined what the law *was*, and did not determine what the law *would be* in the future—as the code of conduct does. See also Midland Cogeneration Venture Ltd P'ship v MPSC, 199 Mich App 286; 501 NW2d 573 (1993).

b) Federal Case Law

Inasmuch as In re PSC Guidelines is binding, on point, and adverse, an attempt to rely on federal law for support of the Court of Appeals decision is misplaced. Moreover, it is misguided. First, the federal APA is not the same as Michigan's APA. In particular, the federal APA does not include a provision such as MCL 24.207(f). Second, federal case law is actually consistent with In re PSC Guidelines.

NLRB v Wyman-Gordon Co, 394 US 759 (1969) (plurality opinion), is the federal case on point. In Wyman-Gordon, the Supreme Court held that the rulemaking provisions of the federal APA "may not be avoided by the process of making rules in the course of adjudicatory proceedings," nor may an agency "replace the statutory scheme with a rulemaking procedure of its own invention." Id. at 764.[9] Thus, under the federal APA, the Supreme Court has specifically addressed whether an agency like the PSC may adopt rules through adjudication, as in the present case, or through a procedure of "its own invention." The U.S. Supreme Court has stated that such circumvention of the federal APA's rulemaking procedures is impermissible.

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[9] Justices Fortas authored the plurality opinion in Wyman-Gordon and was joined by three other Justices: Chief Justice Warren and Justices White and Stewart. Justice Douglas, dissenting on the outcome of the case, wrote that "an agency is not adjudicating when it is making a rule to fit future cases." Wyman-Gordon, 394 US at 777 (Douglas, J, dissenting). Justice Harlan also authored a dissenting opinion in which he wrote that "[t]he language of the Administrative Procedures Act does not support the Government's claim that an agency is 'adjudicating' when it announces a rule which it refuses to apply in the dispute before it." Wyman-Gordon, 394 US at 780 (Harlan, J, dissenting).

NLRB v Bell Aerospace Co Div of Textron, Inc, 416 US 267 (1974), does not hold that an agency may adopt rules through adjudication. Bell Aerospace merely holds that whether to announce new standards by general application (via rulemaking) or by individual case (via adjudication) is within the discretion of the agency. See Bell Aerospace, 416 US at 293-294. This cannot be disputed inasmuch as new standards are developed through both legislation and adjudication. An agency may develop standards by interpreting the law on a case-by-case basis through adjudication and applying such individual interpretations retroactively; or, it may develop policy of general applicability by announcing its interpretations of law through the enactment of rules applied prospectively.

That Bell Aerospace does not alter Wyman-Gordon, but instead addresses a different principle regarding rulemaking under the APA, is evidenced by an opinion from Justice Scalia fifteen years after Bell Aerospace was decided:

> "[T]he entire [Administrative Procedures] Act is based upon a dichotomy between rule making and adjudication. . . . Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities." [quoting the 1947 Attorney General's Manual on the Administrative Procedures Act]
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> * * * *
>
> Adjudication *deals* with what the law was; rulemaking deals with what the law will be. That is why we said in [SEC v Chenery Corp, 332 US 194 (1947)]:
>
> > "Since the Commission, unlike a court, *does have the ability to make new law prospectively through the exercise of its rule-making powers*, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct. . . . The function of

> filling in the interstices of the Act should be performed, as much as possible, *through this quasi-legislative promulgation of rules to be applied in the future.*" [Chenery, 332 US at 202 (emphases added).]
>
> And just as *Chenery* suggested that rulemaking was prospective, the opinions in *NLRB v. Wyman-Gordon Co.* suggested the obverse: that adjudication could *not* be purely prospective, since otherwise it would constitute rulemaking. Both the plurality opinion, joined by four of the Justices, and the dissenting opinions of Justices Douglas and Harlan expressed the view that a rule of law announced in an adjudication, but with exclusively prospective effect, could not be accepted as binding (without new analysis) in subsequent adjudications, since it would constitute rulemaking and as such could only be achieved by following the prescribed rulemaking procedures. Side by side these two cases, *Chenery* and *Wyman-Gordon*, set forth quite nicely the "dichotomy between rulemaking and adjudication" upon which the "entire [APA] is based." [quoting Attorney General's Manual at 14.]

Bowen v Georgetown Univ Hosp, 488 US 204, 218-219, 221 (1988) (Scalia, J, concurring) (emphases in original). See also 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20:8, at 30 (2d ed 1983) ("[A]n agency having rulemaking power is forbidden by . . . *Wyman-Gordon* to make new law in an adjudication if it is to be limited to prospective effect").[10]

For these reasons, federal law is unavailing. Federal case law, properly interpreted, supports the interpretation that quasi-legislative administrative rules may not be adopted through quasi-judicial contested cases.

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[10] Moreover, because Bell Aerospace was decided in 1974, Wyman-Gordon represented the state of the "rule v. order" federal law when Michigan enacted its APA in 1969. (Wyman-Gordon was decided on April 23, 1969, and the 1969 Act was signed into law on August 12, 1969.) As such, even if Bell Aerospace did overrule Wyman-Gordon, which it did not, it would still be presumed that the Michigan Legislature had the Wyman-Gordon interpretation in mind when it enacted the APA in 1969.

4. The Contested Case Is Not Designed For The Adoption Of Administrative Rules

The very nature of rulemaking and adjudication underscores the principle that administrative rules are not to be adopted through a contested case.

> Rulemaking, the quasi-legislative power, is intended to add substance to the Acts of Congress, to complete absent but necessary details, and to resolve unexpected problems. Adjudication, the quasi-judicial power, is intended to provide for the enforcement of agency statutes and regulations on a case-by-case basis.

3 STEIN, MITCHELL & MEZINES, ADMINISTRATIVE LAW § 14.01, *Rulemaking versus adjudication* (Bender 2004). "[A]n administrative officer exercises power over either future conduct of persons subject to jurisdiction—that is, quasi-legislatively—or past conduct—that is, quasi-judicially." SOLOMON BIENENFELD, MICHIGAN ADMINISTRATIVE LAW, § 1-4 (ICLE 1978). While policy is in some manner defined in a contested case, just as in some manner policy is decided in a judicial case since new principles and standards are announced, it is done so within certain parameters—namely by applying a "statute, and any previously promulgated rules, to a particular set of facts." DON LEDUC, MICHIGAN ADMINISTRATIVE LAW § 1:06 (West 2001). In other words, rulemaking is the agency process for *making* law, while adjudication is the process for *finding* law through interpretation and application of made law.

An examination of the overall APA design of procedural protections concerning an agency's separate exercise of its quasi-legislative and quasi-judicial powers demonstrates these fundamental, structural distinctions. Compare MCL 24.231 et seq., with MCL 24.271 et seq. The quasi-legislative and quasi-judicial processes are distinct and not interchangeable. As was explained to the bench and bar immediately following the passage of the 1969 Act:

> Adjudicatory techniques involve a special type and degree of party participation. The named persons involved in the proceeding are entitled to a trial-type hearing with a determination on the basis of a record. The agency must produce substantial evidence in support of its findings and judicial review is available to police this requirement. Rulemaking, on the other hand, is modeled on the legislative pattern, and the nature and degree of party participation is markedly different. Any member of the public, not merely named parties, may participate in the sense of offering written views and comments. The agency may base its determination on a broader range of legislative and political considerations; it is not limited in the formulation of a rule to materials compiled at a public hearing. Moreover, a rule is generally of prospective application, whereas an adjudicatory decision in an individual case normally applies the principles stated in the decision to past facts, and in that sense is retroactive.

ROGER C. CRANTON & GRACE W. HOLMES, THE NEW MICHIGAN ADMINISTRATIVE PROCEDURES, at 54 (ICLE 1970).

As this Court recently explained, "the Legislature has prescribed an elaborate procedure for rule promulgation in order to 'ensure that none of the essential functions of the legislative process are lost in the course of the performance by agencies of many law-making functions once performed by the Legislature.'" Danse Corp, 466 Mich at 183 (quoting Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs, 431 Mich 172; 428 NW2d 335 (1988)). The APA's quasi-judicial contested case proceedings are inadequate substitutes for the "essential functions of the legislative process" intended to be ensured by the APA's rulemaking procedures. The judicial process is simply not properly equipped to produce legislation. Cf. McDougall v Schanz, 461 Mich 15, 35 n 19; 597 NW2d 148 (1999) (noting that the legislative branch is better equipped to undertake a deliberative approach to making policy decisions than the judicial branch). Accordingly, the quasi-judicial contested case provisions are not designed or sufficient for the quasi-legislative act of rulemaking.

In addition to the complete absence of the many quasi-legislative protections identified above, the inadequacies of the APA's contested case procedures in the quasi-legislative context are apparent even within the APA's contested case provisions. For example, MCL 24.282 provides:

> [A] member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. . . . An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case.

This provision essentially limits public discussion. It is beyond dispute that our form of democratic government is based in large part on public access to policymakers, open and public debate about proposed policy, and the accountability of policymakers. The APA rulemaking procedures aim to guarantee these foundational principles in the arena of agency policymaking. Application of statutory provisions such as MCL 24.282, designed for quasi-judicial proceedings which are much different than the legislative process involved when an agency is adopting rules of general and prospective applicability, highlight the inadequateness and inappropriateness of an agency creating administrative rules in individual, retroactive contested cases.

Similarly, an interpretation that agencies may adopt administrative rules through contested cases circumvents the Legislature's clear intent to have an agency's quasi-legislative actions reviewed by the Legislature, and its quasi-judicial actions reviewed by the judiciary. See, e.g., MCL 24.245a (providing procedures for review of proposed rules by the Legislature's

Joint Committee on Administrative Rules); MCL 24.301 (providing judicial review of a contested case). Moreover, it leaves the judicial branch in the position of having to violate the separation of powers in order to serve as a check on agency quasi-legislative decisions; or in the more likely alternative, it permits an agency to simply evade any meaningful review (legislative or judicial) of its decisions—which is counter to the Legislature's general intent to provide the public with procedural protections against agency abuses of power through the APA's provisions.[11]

5. The Background And History Of The APA Also Undermine The Court of Appeals Decision

At the heart of this case is the Legislature's intent through the enactment of the APA to provide democratic, procedural protections to the public for agency adoption of administrative rules, which carry with them the force and effect of law. Accordingly, consideration of the underlying purposes and legislative development of the APA may be instructive.

a) The Underlying Purposes Of The APA

One of the most significant developments in government during the last century has been the increased utilization of the administrative agency possessing, in addition to its executive

[11] Moreover, notwithstanding that the APA's "elaborate" rulemaking procedures are absent in a contested case hearing, the presence of numerous procedural protections required in a contested case are rendered nugatory by allowing an agency to adopt administrative rules in a contested case. For example, MCL 24.271 requires the parties in a contested case to be given notice of "the particular sections of the statutes and rules involved." If the rules are being created during the contested case by the agency, notice of those rules cannot be provided to the parties at the commencement of the case.

branch enforcement powers, "quasi-legislative" and "quasi-judicial" powers.[12] See MICHIGAN LAW REVISION COMMISSION, SECOND ANNUAL REPORT, 1967, p 5 ("1967 LAW REVISION COMMISSION REPORT" or "Commission's Report"). See also William C. Fulkerson & Dennis J. Donohue, *The Basics: A practical introduction to administrative law in Michigan*, 81 MICH B J 13 (2002). "Because of its extraordinary combination of powers, the administrative agency has caused continuous examination of its operations, particularly with respect to the opportunities for abuse of powers." 1967 LAW REVISION COMMISSION REPORT, p 5.

Fearing this potential for agency abuse of power, the Legislature enacted several limiting measures, including the Administrative Procedures Act, the Freedom of Information Act, and the Open Meetings Act. See SOLOMON BIENENFELD, MICHIGAN ADMINISTRATIVE LAW, § 3-1 (ICLE 1978). "Basically, the principles of administrative law arose from efforts to limit the discretion of administrative agencies, to develop fair and open procedures in the adoption of rules and the conduct of contested cases, and to make it easier to predict the actions members of the executive branch will take in the exercise of their powers." Id. at § 1-4. These controls were established by the Legislature to prevent the unbridled exercise of power by the bureaucracy, and were applauded by the populace. Id. at § 1-3. It is upon this backdrop that the Administrative Procedures Act of 1969 is considered.

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12 These powers are "quasi" in nature because the Legislature cannot convey true legislative or judicial powers to the executive branch, but can confer only those powers which are administrative in nature. See Const 1963, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."). See also DON LEDUC, MICHIGAN ADMINISTRATIVE LAW §§ 2:22, 4:04 (West 2001).

b) The Evolution Of The APA In Michigan

(1) Early Versions Of The APA

The first administrative procedures act in Michigan was adopted in 1943. See Public Act 88 of 1943 ("1943 Act" or "PA 88 of 1943"); MCL (1948) 24.71 et seq. The 1943 Act did not include substantial procedural protections for agency rulemaking or adjudication, but generally concerned only the filing of promulgated rules for publication and transmission to the Legislature. Of note, the definition of "rule" was basic and, as pertinent here, did not expressly exclude any product of a contested case or agency adjudication.[13]

In 1952, the Legislature revised the Act by largely enacting the Model State Administrative Procedures Act. See Public Act 197 of 1952 ("1952 Act" or "PA 197 of 1952"). The 1952 Act introduced procedural protections for agency adjudications, i.e. "contested cases,"

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[13] The 1943 Act provided:

> "Rule" includes every rule or regulation, amendments thereto or revocation thereof, made by any state agency, except a rule, regulation or order which:
>
> (a) Relates only to the organization or internal management of the state agency;
>
> (b) Establishes or fixes rates or tariffs;
>
> (c) Pertains to game and fish; or
>
> (d) Relates to the use of public works, including streets and highways, under the jurisdiction of any state agency, when the effect of such order is indicated to the public by means of signs or signals.

PA 88 of 1943, § 24.71(2).

into Michigan's general law of administrative procedures. See PA 197 of 1952, §§ 24.104-24.109. In addition, it added minimal procedural requirements for agency rulemaking by directing agencies to adopt rulemaking procedures, provide public notice of proposed rules, and afford interested persons the opportunity to comment on proposed rules. Id. at § 24.102. However, the definition of "rule" remained rather elementary, at least compared to the rather explanatory definition in the current APA. In particular, it did not expressly exclude the adjudicative results of a contested case. Id. at § 24.101(2).[14]

(2) The Events Leading To The Adoption Of The Administrative Procedures Act Of 1969

In 1961, the National Conference of Commissioners on Uniform State Laws adopted its Revised Model State Administrative Procedures Act ("Revised Model Act"). See 15, 15A UNIFORM LAWS ANNOTATED, *Civil Procedural and Remedial Laws* (West 2000). In Michigan,

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[14] The 1952 Act provided:

> "Rule" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public, nor such rules and regulations of the state department of health as may be necessary during emergencies, floods, epidemics, invasion or other disasters; nor emergency rules, regulations and orders issued [concerning oil, gas, and minerals.]

PA 197 of 1952, § 24.101(2).

legislative consideration of the Revised Model Act was prompted by the 1967 report of the Michigan Law Revision Commission. See 1967 LAW REVISION COMMISSION REPORT, pp 5-19. The proposed administrative procedures act in the Commission's Report, however, did not include a distinctly explanatory definition of "rule" and did not list many exclusions. In particular, it did not include a "contested case" exclusion in any form.[15]

In notably expedited fashion, the Legislature in 1968 enacted legislation similar to the act proposed by the Commission, but which still did not include any exclusions from the definition

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[15] The 1961 Revised Model Act provided a rudimentary definition of "rule":

> "rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued [by agencies], or (C) intra-agency memoranda.

REVISED MODEL ACT at § 1(7).

The Commission's proposed definition made only modest alterations to the Model Act's definition:

> "rule" means each agency regulation, standard, or statement of policy or interpretation of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (a) statements concerning only the internal management of any agency, or (b) declaratory rulings issued [by agencies], or (c) intra-agency memoranda, or (d) rules relating to the use of streets or highways, whose terms are indicated to the public by means of signs or signals.

1967 LAW REVISION COMMISSION REPORT at § 1(7).

of "rule" for the products of a contested case.[16] See SB 1374, 74th Leg., Reg. Sess. (1968). The 1968 legislation, however, was pocket-vetoed by Governor Romney, who in objecting to the legislation stated, inter alia:

> A matter of grave concern to the departments and to myself is the definition of "rule" in Section 7 of the bill. This section is so broad that it would appear that virtually any announcement of official policy would be subject to the rule-making procedures outlined in Chapter 2.

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[16] Senate Bill 1374 of 1968, as adopted, provided at Section 7:

> "Rule" means a substantive, procedural or interpretive agency rule or regulation, standard, policy, guideline or interpretation of general applicability, which implements, interprets or prescribes law or policy, or which describes the organization, procedure or practice requirements of an agency, and which the agency is by law expressly or impliedly directed or authorized to make, establish, adopt or promulgate. It includes an emergency rule and the amendment or rescission of prior rule, but does not include:
>
> (a) An executive order of the governor.
>
> (b) An intra-agency memorandum.
>
> (c) A statement only as to internal management of an agency.
>
> (d) A declaratory ruling issued pursuant to section 45 ["An interested person may file with an agency written request for a declaratory ruling as to the applicability of a statute administered by that agency or of a rule or order of the agency. Within 60 days thereafter the agency shall deny the request giving reasons therefor or issue a declaratory ruling. A declaratory ruling has the same status as an agency decision or order in a contested case."]
>
> (e) A rule or order establishing or fixing rates or tariffs, or pertaining to game and fish and promulgated . . . .
>
> (f) A rule relating to the use of streets or highways whose provisions are indicated to the public by means of signs or signals.

3 JOURNAL OF THE SENATE, pp 2101-2102 (1968).

> Many administrative agencies issue guidelines and suggestions which do not have the force of law, but which are informative to the public and to governmental agencies which deal with the state. These guidelines are intended to be helpful and are constantly being updated. In the fields of public health and social welfare they deal with highly technical subjects and are constantly under review and change. If this type of activity were subject to the cumbersome rule-making process outlined in the bill, a department could be brought to a virtual stand-still, and the information needed by the public for their protection would not be available.

Statement of September 4, 1968, *available in* News Releases of Governor Romney, July-Dec 1968 (available at the Library of Michigan).

(3) The Enactment Of The Administrative Procedures Act Of 1969

Early in the next legislative session, a bill revising Michigan's general administrative procedures was again introduced. See SB 241, 75th Leg., Reg. Sess. (1969) ("Senate Bill 241"). Senate Bill 241 was overwhelmingly adopted by the Legislature and signed into law as Public Act 306 of 1969 ("1969 Act" or "PA 306 of 1969").

The 1969 Act did not alter the central policy objectives of the legislation passed by the Legislature in 1968 and pocket-vetoed by Governor Romney. First, it established extensive rulemaking procedures. See PA 306 of 1969, §§ 24.231-24.264. Second, it incorporated significantly greater protections for parties in contested cases. See PA 306 of 1969, §§ 24.271-24.287.

As a result of an obvious effort to address the concerns raised by Governor Romney, however, the 1969 Act was distinguishable from the 1968 legislation in several respects. As

pertinent here, the definition of "rule" was more detailed and explanatory, apparently in response to Governor Romney's specific concern that the definition in the 1968 legislation could potentially be interpreted as encompassing "virtually any announcement of official policy" and guidelines which do not have the force of law.[17] "Rule" was more precisely defined in the 1969

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[17] The 1969 Act provided:

> "Rule" means an agency regulation, statement, standard, policy, ruling or instruction of general applicability, which implements or applies law enforced or administered by the agency, or which prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission thereof, but does not include the following:
>
> (a) A resolution or order of the state administrative board.
>
> (b) A formal opinion of the attorney general.
>
> (c) A rule or order establishing or fixing rates or tariffs.
>
> (d) A rule or order pertaining to game and fish and promulgated . . . .
>
> (e) A rule relating to the use of streets or highways the substance of which is indicated to the public by means of signs or signals.
>
> (f) A determination, decision or order in a contested case.
>
> (g) An intergovernmental, interagency, or intra-agency memorandum, directive or communication which does not affect the rights of, or procedures and practices available to, the public.
>
> (h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet or other material which in itself does not have the force and effect of law but is merely explanatory.
>
> (i) A declaratory ruling or other disposition of a particular matter as applied to a specific set of facts involved.

Footnote continued on next page ...

Act to expressly exclude such things as resolutions and orders of the state administrative board, attorney general opinions, certain government and agency memoranda, instructional forms, interpretive statements, guidelines, a "decision by an agency to exercise or not to exercise a permissive statutory power," and a "determination, decision or order in a contested case."

c) The Exclusion Of "A Determination, Decision Or Order In A Contested Case" Was Not Contemporaneously Understood As Creating An Alternative Rulemaking Process

The adoption of the MCL 24.207(f) exclusion was legislatively uneventful. This is undoubtedly because the expansive definition of "rule" in the 1969 Act was merely an effort to avoid any confusion as to the definition of "rule," as foreshadowed by Governor Romney in his statement rejecting the 1968 legislation. In fact, counsel for *amicus curiae* could locate no legislative history, statement from Governor Milliken (who signed the 1969 Act),[18] or commentary surrounding the passage of the 1969 Act suggesting that the exclusion of a "determination, decision or order in a contested case" represents anything other than that

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> (j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected thereby.

PA 306 of 1969, § 24.207.

18 When Governor Romney resigned on January 22, 1969, to become U.S. secretary of housing and urban development, then-Lieutenant Governor Milliken became governor.

suggested by the text. Specifically, the record is devoid of any legislative intent that the "contested case" exclusion serves as an *alternative* rulemaking process.[19]

To the contrary, as explained to the bench and bar immediately following passage of the 1969 Act:

> The second portion of the definition of "rule" is a series of specific exclusions from the broader concept. Several of these exclusions are intended to make it clear that *individualized determinations* are not to be considered as rules. Thus paragraph (f) states that a "determination, decision or order in a contested case" is not a "rule." Similarly, paragraph (i) states that a "declaratory ruling or other disposition of a particular matter as applied to a specific set of facts involved" is not within the definition of "rule."

ROGER C. CRANTON & GRACE W. HOLMES, THE NEW MICHIGAN ADMINISTRATIVE PROCEDURES, at 59 (ICLE 1970) (emphasis in original).

Accordingly, just as the text provides, the MCL 24.207(f) exclusion was contemporaneously understood to serve as nothing more than a mere explanation that the products of a "contested case"—determinations, decisions and orders—are not subject to the APA's rulemaking procedures because such *individualized adjudicative* products are not *legislative* vehicles. Since administrative rules are never logically adopted through a "determination, decision, or order in a contested case," such adjudicative products cannot constitute a "rule" and accordingly are not subject to the APA's rulemaking procedures. Simply put, a quasi-legislative "rule" is not, and cannot be, enacted through a contested case.

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[19] Counsel for *amicus curiae* searched the papers of the Legislature and Governors Romney and Milliken located at the University of Michigan Bentley Historical Library, the Michigan State Archives, and the Library of Michigan.

C. The "Exercise of Permissive Power" Exception Does Not Apply

The Court of Appeals also found that MCL 24.207(j), another exclusion to the definition of "rule," exempted promulgation of the code of conduct from the APA's rulemaking procedures. This provision exempts from the definition of a rule an agency's decision "to exercise or not exercise a permissive statutory power." The language of the statute does not support the Court's conclusion. Moreover, overruled case law has been used to support the Court's interpretation of MCL 24.207(j). The current, binding case law *not* cited interprets the statutory exclusion according to its plain, unambiguous language and renders it inapplicable to the code of conduct.[20]

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[20] The Court of Appeals' opinion regarding MCL 24.207(j) is obtuse. The panel wrote:

> Furthermore, while an agency's decision to exercise discretionary statutory authority does not constitute rulemaking, MCL 24.207(j), its implementation of that authority is subject to the APA's rulemaking authority, *AFSCME v. Dep't of Mental Health*, 452 Mich. 1, 13, 550 NW2d 190 (1996). The plain language of MCL 460.10a(4) requires the PSC to implement a code of conduct within a specified period. However, unlike other subsections of MCL 460.10a, MCL 460.10a(4) did not authorize the PSC to implement such a code by order. Appellants argue that absent this direct authorization, the PSC was not enabled to implement a code of conduct. By reading MCL 460.10a in its entirety, we find that the Legislature clearly intended for the PSC to implement a code of conduct.

261 Mich App at 12.

Thus, the panel (1) appears to understand that PA 141 provides the PSC with a mandate, not permissive statutory authority; (2) correctly holds that the implementation of permissive statutory authority is subject to the APA's rulemaking procedures; and (3) then concludes the obvious—that through PA 141, the Legislature intended the PSC to adopt a code of conduct. The sequential logic of the opinion should have compelled the opposite result.

1. The Plain, Unambiguous Text Contradicts The Court's Holding

The duty of the judiciary is to give effect to the intent of the Legislature. Roberts, 466 Mich at 63. Pursuant to this duty, the plain, unambiguous language of a statute must be enforced as written. Danse Corp, 466 Mich at 181-182.[21] Every word of a statute is presumed to carry some meaning and, accordingly, effect must be given to each word. Id. at 182.

MCL 24.207(j) does not cover an agency decision whether to exercise *any* statutory power. Rather, by its plain language, it protects only an agency decision whether to exercise a *permissive* statutory power.

It is appropriate to refer to a dictionary to discern the common, ordinary meaning of a word. See Title Office, Inc v Van Buren County Treasurer, 469 Mich 516, 522; 676 NW2d 207 (2004). The word "permissive" means "allowing discretion" or "optional." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1984). The antonym of the word "permissive" is "mandatory," which means "obligatory" or "constituting a command." Id. Accordingly, MCL 24.207(j) protects *discretionary* statutory power, but not *mandatory* statutory power.

In this case, the PSC adopted the disputed code of conduct pursuant to PA 141, which provides:

> Within 180 days after the effective date of the amendatory act that added this section, *the commission **shall** establish a code of conduct* that shall apply to all electric utilities. The code of conduct ***shall*** include . . . .

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[21] In addition to the plain and unambiguous language of MCL 24.207(j), no legislative history aids the Appellees' arguments regarding the exception. See supra Section III.B.5.

PA 141, § 10a(4); MCL 460.10a(4) (emphases added).[22]

"[U]se of the term 'shall' rather than 'may' indicates mandatory rather than discretionary action." People v Grant, 445 Mich 535, 542; 520 NW2d 123 (1994). See also Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 65; 642 NW2d 663 (2002) (stating that "shall" means mandatory, not discretionary). Because PA 141 grants the PSC a *mandatory* as opposed to a discretionary, or "permissive," statutory power through use of the word "shall," the MCL 24.207(j) rulemaking exemption is inapplicable. Simply put, MCL 24.207(j) applies only to permissive statutory power, and PA 141 does not grant a permissive statutory power but a mandatory one.

That MCL 24.207(j) concerns only discretionary statutory power is reinforced by the fact that it protects only "the decision whether to exercise or not to exercise" that power. Where a statute mandates agency action, there exists no "decision whether to exercise or not to exercise" the authority to act. The Legislature has already made the decision for the agency.

Further, the exclusion's protection of only "the decision whether to exercise or not to exercise" a permissive statutory power carries its own limitation. That is, by specifically including only the decision *whether to exercise* a power within its reach, MCL 24.207(j) does not exclude the exercise *of* that power from the definition of "rule." The plain, unambiguous language of MCL 24.207(j) permits no other interpretation. Accordingly, even if PA 141 granted a permissive statutory power (which it does not), MCL 24.207(j) would exclude from the

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[22] Public Act 88 of 2004 amended MCL 460.10a by replacing the phrase, "Within 180 days after the effective date of the amendatory act that added this section" with "No later than December 2, 2000," which represents the date that falls 180 days after the effective date of PA 141.

APA's rulemaking procedures only the decision whether to adopt a code of conduct—not the adoption of that code of conduct itself.

As explained to the bench and bar immediately following passage of the 1969 Act:

> [S]ubsection (j) states that a 'decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected thereby" is not a "rule." Hence an agency determination to initiate an investigation, or not to initiate one, need not be accompanied by rulemaking procedures.

ROGER C. CRANTON & GRACE W. HOLMES, THE NEW MICHIGAN ADMINISTRATIVE PROCEDURES, at 59 (ICLE 1970).

2. Current, Binding Michigan Case Law Contradicts The Court's Interpretation

In Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs, 431 Mich 172; 428 NW2d 335 (1988), this Court addressed MCL 24.207(j). In that case, the statute creating authority provided that the department director "shall promulgate rules for the conduct of hearings within the state department." 431 Mich at 178 (quoting MCL 400.9(1)). Detroit Base Coalition concluded that the hearing policy implemented by the department was "not an exercise of permissive statutory authority [because the] only relevant statutory provision *mandates* that the department conduct hearings pursuant to promulgated rules." 431 Mich at 188 (citing MCL 400.9(1)) (emphasis in original). Thus, Detroit Base Coalition correctly interprets MCL 24.207(j) as protecting only permissive, not mandatory, statutory power.[23]

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[23] Detroit Base Coalition remains good law. Nevertheless, neither Appellee addresses the case in the context of the MCL 24.207(j) "permissive statutory power" exclusion in their

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In AFSCME v Dep't of Mental Health, 452 Mich 1; 550 NW2d 190 (1996), this Court addressed the scope of the MCL 24.207(j) exclusion. At issue in AFSCME was whether a standard contract used by the Department of Mental Health constituted an administrative "rule" under MCL 24.207. Interpreting the MCL 24.207(j) exclusion, the Court addressed whether the standard contract was exempt since it was the department's choice whether to enter into contracts with its providers:

> The dissent reasons that because the department may choose whether to enter into contracts for the provision of residential services, the standard form contract cannot be a rule. The error in this reasoning is that while the department has discretion regarding *whether* to contract for the provision of statutorily mandated services, once it chooses to do so, it cannot abdicate its responsibilities under the Mental Health Code and the APA and set standards and policies that regulate the provision of such services without complying with the APA's procedural requirements.
>
> * * * *
>
> While the department can choose not to contract with private group home providers in order to fulfill its duties under the Mental Health Code, once it chooses to do so, the terms of the standard form contract that govern the provision of care to group home residents that are developed and set by the department must be promulgated as a rule.

452 Mich at 12, 13 (emphasis in original).

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briefs. The PSC includes a two-page quotation from Professor LeDuc explaining Detroit Base Coalition in the part of its brief addressing the rulemaking-versus-adjudication issue, (PSC Br at 14-15), but never in the context of MCL 24.207(j). The MAFC merely cites Detroit Base Coalition in a footnote—and in an explanatory string indicating that the Court of Appeals panel in this case cited Detroit Base Coalition for the proposition that "in Michigan, the preferred method of agency policymaking is by the promulgation of rules." (MAFC Br at 20 n 81). Moreover, like the PSC, the MAFC's lone reference to Detroit Base Coalition was located in the section of its brief addressing the rulemaking-versus-adjudication issue.

The AFSCME Court found Spear v Michigan Rehab Servs, 202 Mich App 1; 507 NW2d 761 (1993), instructive. See AFSCME, 452 Mich at 12-13. In Spear, the court recognized that the federal regulations at issue authorized, but did not require, the State to measure need in determining eligibility for vocational rehabilitation services. The state agency did not promulgate its policy on needs testing as a rule, asserting that MCL 24.207(j) excused it from the rulemaking procedures. The Spear court disagreed:

> [W]hile the agency's decision to employ a needs test represents the discretionary exercise of statutory authority exempt from the definition of a rule under subsection j, the test itself, which is developed by the agency, is not exempt from the definition of a rule and, therefore, must be promulgated as a rule in compliance with the Administrative Procedures Act.

202 Mich App at 5.

AFSCME and Spear[24] represent the current state of the law in Michigan regarding the scope of MCL 24.207(j). That is, while the exclusion covers *whether* to exercise a permissive statutory power, it does not cover the exercise *of* that power. Applied to the present case, assuming *arguendo* that PA 141 creates a permissive not a mandatory power (which it does not), only the PSC's decision to adopt a code of conduct would be exempt from the APA's rulemaking procedures; the process of adopting the contents of the code of conduct would not be exempt under MCL 24.207(j).

Appellees' reliance on Pyke v Dep't of Social Servs, 182 Mich App 619; 453 NW2d 274 (1990), is misplaced because that decision was overruled. The Pyke majority held broadly that "[i]f an agency policy follows from its statutory authority, the policy is an exercise of permissive statutory power and not a rule requiring formal adoption." 182 Mich App at 630. In dissent,

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[24] Remarkably, neither the PSC nor MAFC discuss or even cite to AFSCME or Spear.

Judge Shepard wrote that because the grant of statutory authority provided that the department "shall" establish the standards at issue, there was no *permissive* statutory power.

> If an agency is free to exercise or not to exercise a power, the agency need not promulgate a rule. Where the agency is required to establish standards or rights, it must promulgate a rule.

182 Mich at 633 (Shepard, J, dissenting).

One year later, Pyke was expressly overruled in Palozolo v Dep't of Social Servs, 189 Mich App 530; 473 NW2d 765 (1991). In Palozolo, the court adopted Judge Shepard's dissent in Pyke.[25] See Palozolo, 189 Mich App at 533, 533 n 1.[26]

Appellees' reliance on Hinderer v Dep't of Social Servs, 95 Mich App 716; 291 NW2d 672 (1980), and Colombini v Michigan Dep't of Social Servs, 93 Mich App 157; 286 NW2d 77 (1979), is also misplaced. To the extent that these cases stand for the broad proposition that "if an agency policy . . . follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring adoption," 95 Mich App at 727 (citing Colombini, supra), they fail to follow the plain language of MCL 24.207(j).

First, such an interpretation of MCL 24.207(j) effectively eliminates the word "permissive" from the statute by encompassing all of the agency's "statutory authority." Every word of a statute is presumed to carry some meaning and, accordingly, effect must be given to

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[25] The Palozolo court expressly displaced the Pyke majority opinion in accordance with Administrative Order No. 1990-6, which made opinions after November 1, 1990 binding. As the Palozolo court instructed, because Pyke was decided before November 1, 1990, and Palozolo was decided after that date, Palozolo "is binding on all trial courts, administrative tribunals, and on all panels of the Court of Appeals . . . until reversed." Palozolo, 189 Mich App at 533 n 1.

[26] Regardless, the Pyke majority opinion was clearly inconsistent with Detroit Base Coalition, supra, where this Court held that MCL § 24.207(j) protects only permissive, not mandatory, statutory power.

each word. Danse Corp, 466 Mich at 182. Second, such a broad reading of MCL 24.207(j) swallows the entire definition of "rule" and renders the APA's rulemaking procedures wholly inapplicable. According to the incorrect interpretation of MCL 24.207(j) in Hinderer and Colombini, every time an administrative agency acts it is excused from the APA's rulemaking procedures. This is not a reasonable interpretation. Third, the Hinderer/Colombini interpretation fails to account for the limited scope of MCL 24.207(j) by broadly sweeping into its reach not only the decision whether to exercise a statutory power to adopt a policy, but the policy itself. Such interpretation is directly contrary to AFSCME, supra, and Spear, supra, as discussed *ante.*

Appellees' reliance on Michigan Trucking Ass'n v MPSC, 225 Mich App 424; 571 NW2d 734 (1997) is also incorrect. The statute there provided:

> The public service commission, in cooperation with the department of state police, will develop and implement ***by rule or order***, a motor carrier safety rating system . . . .

MCL 479.43, quoted at 225 Mich App at 426. Accordingly, the PSC was expressly exempted from the APA's rulemaking procedures because it could adopt the rating system "by rule or order." See Danse Corp, 466 Mich at 184 (discussing clear legislative intent to waive the requirements of the APA).[27] PA 141 includes no such language concerning the adoption of a code of conduct.

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[27] Moreover, to the extent any general statements in Michigan Trucking could be misinterpreted so as to exempt the code of conduct in the present case from the APA's rulemaking procedures, it is worth noting that the briefs submitted by the parties in Michigan Trucking did not alert the court to the fact that Pyke, Hinderer, and Colombini had been either overruled or distinguished by Palozolo, Spear, Detroit Base Coalition and AFSCME. The Michigan Trucking briefs are attached as Exhibits B and C.

IV. CONCLUSION

To guarantee the democratic protections that accompany lawmaking, the Legislature has prescribed in the APA specific procedures that the PSC must follow when adopting administrative rules. The APA does not permit an agency to circumvent the APA's rulemaking procedures by adopting quasi-legislative administrative rules in a quasi-judicial contested case, or through a rulemaking scheme of the agency's own invention. The plain language of the "contested case" exception to the APA's rulemaking procedures makes clear that the PSC may not adopt rules through a contested case, as do Michigan and federal case law, the underlying purposes of the APA, the basic structure of the APA, and the legislative history of the APA. In this case, "the PSC culled elements of rulemaking, adjudication, and general policy formulation, with little regard for the dictates of the APA." In re PSC Guidelines, 252 Mich App at 267-268.

In addition, the exclusion of a "decision to exercise or not to exercise a permissive statutory power" from the APA definition of "rule" is inapplicable in the present case. PA 141 mandates the PSC to adopt the code of conduct; it does not leave such adoption to the discretion of the PSC. Accordingly, the PSC was not exercising a permissive statutory power when it adopted the code of conduct. Moreover, the exclusion protects only the decision whether to exercise a permissive statutory power, not the exercise of that power. Michigan case law has already resolved these issues.

For these reasons, this Court should reverse the Court of Appeals' determination on whether the December 4, 2000 and October 29, 2001 orders of the Michigan Public Service Commission adopted rules, i.e., a code of conduct, that require promulgation under the rulemaking process prescribed by the Administrative Procedures Act.

Respectfully submitted,

SBC MICHIGAN
Craig A. Anderson (P28968)
444 Michigan Avenue, Room 1750
Detroit, Michigan 48226
(313) 223-8033

DICKINSON WRIGHT PLLC
Attorneys for SBC Michigan

By: _____
Jeffery V. Stuckey (P34648)
Allen L. Lanstra, Jr. (P64102)

215 S. Washington Square, Suite 200
Lansing, Michigan 48933-1816
(517) 371-1730

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